DALE DAUGHERTY
JULIE DAUGHERTY

IBLA 94-849, 94-850 Decided April 7, 1997

Appeals from a decision of the State Director, Oregon State Office, Bureau of Land Management, upholding, as clarified and modified, a Notice of Noncompliance. OR 49485 (OR 100-92-02N; ORMC 37258; ORMC 86145).

Affirmed in part and set aside in part.

1. Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Surface Uses

   The BLM properly issues a Notice of Noncompliance pursuant to 43 C.F.R. § 3809.2-2 when it determines that a mining claimant and operator has failed to obtain required state permits and to comply with all pertinent state laws. A decision by a BLM State Office on review of a Notice of Noncompliance for failure to obtain required state permits will be set aside as premature to the extent it finds the appellant liable for additional incidents of noncompliance not raised in the appealed Notice of Noncompliance.

APPEARANCES: Dale Daugherty and Julie Daugherty, Myrtle Creek, Oregon, pro sese; Donald P. Lawton, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Dale Daugherty and Julie Daugherty have separately appealed from the June 8, 1994, Decision of the State Director, Oregon State Office, Bureau of Land Management (BLM), upholding, subject to clarifications and modifications, a Notice of Noncompliance (NNC) issued by the South Douglas Resource Area Manager, Roseburg District, BLM, on March 16, 1994. Because the two appeals arise from the same decision, we hereby consolidate them.

On December 31, 1991, Dale Daugherty and James Holstrom, operators of the Overburden and Wedge unpatented placer mining claims (ORMC 37258 and ORMC 86145, respectively) held by the Golden Laniru Mining Company (Golden Laniru), filed a Notice to Conduct Mining Operations (Notice) on

the claims. 1/ The Notice stated that the operators planned to remove gold from the land using a trummel, a front end loader, and/or a track hoe, and that approximately 6,000 yards of material would be moved between January 5 and November 12, 1992, the specified operating period. The operators did not intend to use any chemicals and proposed to control pollution through holding ponds and daily monitoring. The Notice also indicated that the operators would improve an old road and add a culvert at Lees Creek, and that they would need to cut timber in order to conduct their mining operation.

The BLM reviewed the Notice and by letter dated January 29, 1992, informed Dale Daugherty and James Holstrom that the Notice was incomplete, and that the identified concerns would have to be resolved before the Notice would be considered acceptable. Specifically, BLM indicated that, before beginning activities on the claims, the operators were required to obtain a permit from the Oregon Department of Geology and Mineral Industries (DOGAMI) allowing disturbance of more than 1 acre of surface or movement of more than 5,000 cubic yards of material in a consecutive 12-month period, and one from the Oregon Department of Environmental Quality (DEQ), authorizing activities which increase stream turbidity. 2/ The BLM also pointed out the need for consultation with the U.S. Fish and Wildlife Service (FWS) prior to the start of mining endeavors due to the possibility that the proposed operation might effect the northern spotted owl. The BLM asked for further information concerning the operators' reclamation plans and recommended various reclamation measures.

By letter dated April 7, 1992, DEQ issued a State NNC to Dale Daugherty and James Holstrom finding that their construction and operation of the settling pond on the claims violated Oregon Revised Statutes (ORS) 468.720 and 468.740 and Oregon Administrative Rules (OAR) 340-45-015. The DEQ determined that the location of the settling pond allowed it to collect an inordinate amount of surface runoff, resulting in insufficient freeboard to ensure nonoverflow during heavy rains, and that the placement of the pond in porous soil conditions created underground seepage into Lees Creek. The DEQ ordered immediate closure of the pond.

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1/ The claims, which embrace lands in the SE¼ SE¼ SW¼ sec. 15 and lot 3, sec. 15, T. 28 S., R. 4 W., Willamette Meridian, Douglas County, Oregon, were located by John E. Holstrom. Golden Laniru obtained its interest in the claims from John E. Holstrom pursuant to an option agreement dated Dec. 14, 1991. The case file contains a quitclaim deed dated July 12, 1993, transferring title to the Overburden claim to Golden Laniru, Jim Holstrom, and Dale Daugherty. No quitclaim deed for the Wedge claim appears in the record.

2/ The record contains a copy of a DEQ Water Pollution Control Facilities Permit application signed by James Holstrom on Jan. 8, 1992, but apparently no permit was actually issued to the operators. See Discussion infra.

In a biological opinion issued on August 3, 1992, FWS concluded that the harvest of timber associated with the Overburden/Wedge placer mining operation was not likely to jeopardize the continued existence of the northern spotted owl. Accordingly, BLM authorized the cutting of timber on the claims, and the operators felled the marked trees.

In a noncompliance letter dated February 22, 1993, DEQ found that Dale Daugherty and James Holstrom had discharged highly turbid waste water into Lees Creek in violation of various Oregon statutes and regulations. The DEQ further determined that building and altering the waste water treatment pond without the necessary permit violated applicable statutes and regulations. The DEQ advised the operators that it was referring the violations to DEQ's Enforcement Section and requesting a BLM on-site inspection of the extensive logging done on the claims without effective barriers to protect Lees Creek.

By Stipulation and Final Order (Stipulation) dated January 26, 1994, Dale Daugherty and James Holstrom settled the DEQ civil penalty assessment notices which followed the two DEQ noncompliance notices. In the Stipulation, the operators agreed to pay a total civil penalty of $1,800 plus interest and to submit a complete application for a water pollution control facilities general permit along with their signed copy of the Stipulation.

The BLM conducted numerous compliance inspections of the claims beginning in 1992 and memorialized its findings on the compliance inspection forms contained in the case file. The BLM routinely asked the operators to correct any deficiencies noted during those inspections.

By letter dated January 19, 1994, BLM advised Dale Daugherty and James Holstrom that its January 10, 1994, compliance inspection had revealed various problems requiring rectification to prevent a finding of noncompliance with the regulations at 43 C.F.R. Subpart 3809. The specified problems included: run-off of fuel into the creek; the poor condition of the bridge which required rocking to prevent fuel and soil from entering the creek; the need for additional shaping and reseeding of the spur road; improper labelling of two 55-gallon drums; and the inadequate disposal and storage of miscellaneous mining and household supplies. The BLM also indicated that, since the amount of disturbed acreage appeared to have increased, it would conduct a survey to determine whether the mining operation had disturbed more than 5 acres such that it required the filing of a mining Plan of Operations.

Dale Daugherty responded by requesting a meeting and asking BLM to notify him 24 hours before BLM personnel visited the claims so someone could be present during the inspection. In a February 17, 1994, meeting, Daugherty informed BLM that he had cleaned up the fuel leak and fixed the problem with the drums, and that he would work on the bridge and stream access when site conditions permitted. The BLM agreed that written notice would be sent to him before a mid-March reinspection to ensure his presence on the site.

The BLM inspected the claims on March 10, 1994, without Daugherty being present. As documented in the compliance inspection form, the inspector found that a second bridge had been constructed across the creek, and that additional trees had been cut. She noted that one of the 55-gallon drums did not have a new label, that a small amount of diesel fuel appeared on the surface near the first bridge, and that sanitation facilities for the camper on the claim were not evident. The inspector further commented that DEQ had advised BLM that Daugherty had not paid the fine or resolved the issues from the DEQ noncompliance notices. She recommended that BLM issue a NNC for failure to meet State and local laws.

On March 16, 1994, BLM issued its NNC to Dale Daugherty and James Holstrom, finding that the operators had improperly resumed mining operations prior to meeting all requirements of BLM's January 29, 1992, letter, and that the mining activities violated 43 C.F.R. § 3809.2-2 because they did not comply with all pertinent Federal and State laws. The BLM specified that the operators were required to have a permit from DEQ for activities increasing stream turbidity, and that all the requirements of the Stipulation with DEQ had to be met before operations resumed, including payment of the fines which DEQ had indicated were in arrears. The BLM also concluded that the operators needed permitting from DOGAMI for disturbance of more than 1 acre of surface or movement of more than 5,000 cubic yards of material in a 12-month period. The BLM directed the operators to provide proof of proper sanitation facilities for the camp trailer according to Douglas County standards and to obtain water rights from the Oregon Department of Water Resources through the Douglas County Water Master. The BLM placed the NNC in full force and effect.

Dale Daugherty appealed the NNC to the Oregon State Director as provided by 43 C.F.R. § 3809.4, complaining that he had received no notice of the March reinspection. Apparently confusing the January 29, 1992, letter identified in the NNC with the more recent January 19, 1994, letter, Daugherty asserted that the NNC did not enumerate any of the issues raised in the 1994 letter, all of which he claimed had been appropriately addressed. He also argued that the NNC was procedurally defective because it did not give him a specified amount of time to correct the noncompliance as required by 43 C.F.R. § 3809.3-2(b)(2)(d). As to the substantive issues raised in the NNC, Daugherty first disputed the State's jurisdiction over mining claims located on Federal lands. In any event, he maintained that he did not need a DEQ permit since stream turbidity had not increased. He contended that he had complied with all applicable laws, that he had made payments on the DEQ fine, and that all DEQ noncompliance matters had been resolved in the Stipulation, leaving him free to continue mining operations. He also denied that he needed a permit from DOGAMI and indicated that he was in the process of resolving the sanitation and water right issues.

In a quitclaim deed executed on April 15, 1994, "Jim Holstrom and Dale Daugherty (Golden Laniru Mining, Inc.)" transferred their interests in the Overburden placer mining claim to Julie Daugherty, Dale's wife. The deed did not mention the Wedge placer mining claim.

In her June 8, 1994, Decision, the State Director named Julie Daugherty, in addition to James Holstrom and Dale Daugherty, as the affected parties and found that they had been in continual noncompliance since the issuance of the first letter of noncompliance on January 29, 1992. She rejected Dale Daugherty's contention that the State had no jurisdiction over Federal lands, citing 43 C.F.R. §§ 3809.3-1 and 3809.3-2 as indirectly mandating compliance with applicable State environmental requirements. She indicated that DEQ had advised BLM that the civil penalty payments were in arrears, thus undermining Daugherty's assertion that the DEQ violations had been resolved. The State Director held that all operators were required to comply with Federal and State standards for the disposal and treatment of solid wastes, and that the record contained no evidence that proper sanitation facilities existed on the claims. She also stated that, according to the Douglas County Water Master, Oregon Department of Water Resources, State law required a permit to appropriate water from Lees Creek for use in the mining operations on the claims. Accordingly, the State Director denied the appeal.

Although she upheld the NNC, the State Director did so subject to the following clarifications and modifications:

> 1. The claimants/appellants are not in compliance with DOGAMI requirements pursuant to ORS 517.750, 517.790, and 517.810 because they have disturbed an area greater than one acre and/or removed more than 5,000 cubic yards of material in a one year period without obtaining a State operating permit or filing the required bond or security deposit. The claimants'/appellants' [Notice] indicated that 6,000 yards of material were to be removed. This exceeds the 5,000 yard threshold wherein a bond and permit are required under OAR 632-30-016(1)(e)(D), ORS 517.750, 517.790, and 517.810. Consequently, DOGAMI issued a closure notice on May 19, 1994. The claimants/appellants will need to come into compliance with DOGAMI prior to any continued operation of the claim(s).
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> 2. The DEQ has informed BLM that the claimants/appellants are in the arrears on the monthly payments in satisfaction of the [Stipulation]. The claimants/appellants must come into compliance with DEQ before continuing with operation on the claim(s).
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> 3. Oregon Department of Water Resources through the Douglas County Water Master requires a water right permit for water usage from the creek. The claimants/appellants will need to acquire such a permit before continuing their operation.
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> 4. Rock the access to the original creek crossing from both sides to control the transport of mud onto the bridge and into the creek as the present conditions are causing mud to enter the creek. This is unnecessary and undue degradation in violation of 43 CFR 3809.2-2.

5. Rebuild the original bridge so as to insure that any mud or other deleterious materials spilled on the bridge will not enter the creek as the present conditions are causing unnecessary and undue degradation in violation of 43 CFR 3809.2-2.

6. Remove the unauthorized second bridge, which was constructed across the creek in an area not covered under the existing [Notice]. This is a violation of 43 CFR 3809.1-3(d). Construction of the bridge outside the area in the [N]otice is unnecessary and undue degradation and also violates 43 CFR 3809.2-2 as one creek crossing is adequate for the existing mining operation. If more extensive access is necessary to operate, you will need to modify or amend the Notice.

7. Submit a complete amendment to your Notice addressing your operation beyond your proposed end date of November 12, 1992, and beyond the boundaries of the previously submitted Notice and map. Include a new map showing all present and proposed disturbed areas and how the areas will be used including those areas proposed for occupancy use. Operating outside the boundaries of a submitted Notice is a violation of 43 CFR 3809.2-2. In order to come into compliance, a modification or amendment to the Notice will be required.

8. File a new application for timber removal as required by 43 CFR 3821.4 as you have removed timber in excess of that previously authorized and marked. The cutting that has occurred beyond that previously authorized is a violation of 43 CFR 3821.4 and is a trespass.

9. Remove all unmarked drums and other chemical containers and submit a written spill prevention plan as you have stored hazardous materials on the site in a manner that has led to water pollution and have stored chemicals in unmarked containers. This is a violation of 43 CFR 3809.2-2 and 43 CFR 8365.1-1.

10. Personal property signs can remain, such as on the trailer, and hazard or safety signs may be used where necessary, but any other signs must be removed. The signs posted on the trees are not necessary or incidental to the mining operation.

11. Structures must be temporary in nature. The Douglas County Planning Department has indicated that the structures have been in existence for longer than 90 days. By county zoning ordinance, the claimants/appellants are required to have a county occupancy permit. All such structures must meet county building and sanitation codes: therefore, you must acquire the required permit from the county.

(Decision at 5-7.)

The State Director advised that failure to take the actions necessary to comply with the NNC and her decision within 30 days could justify requiring submittal of a Plan of Operations and a bond for subsequent operations. By granting the 30-day correction period, the State Director attempted to rectify the NNC's failure to provide such a compliance period. See Decision at 4.

We will first address Julie Daugherty's appeal of the State Director's decision. In her appeal, Julie Daugherty argues that "she is not a proper party, and that no [NNC] has ever been sent to her * * *." We agree. The NNC cited only Dale Daugherty and James Holstrom, the owners and operators of record on March 16, 1994, and BLM served only those parties with the NNC. Julie Daugherty, who obtained her interests in the operations through an April 15, 1994, quitclaim deed, was neither mentioned nor served. We, therefore, set aside the State Director's decision to the extent it found Julie Daugherty liable for the noncompliances set out in the NNC. Our decision in this regard does not preclude BLM from citing Julie Daugherty for any noncompliances occurring after she obtained her interests in the operations. 3/

In his Statement of Reasons for Appeal (SOR), Dale Daugherty addresses both the issues presented in the NNC and those first raised in the State Director's decision. He explains that he sold the claim before he received the DEQ permit application he had requested as required by the Stipulation and insists that he has been paying the DEQ fines in accordance with the schedule set in the Stipulation. Daugherty denies that he needs a DOGAMI permit, arguing that since his Notice indicated that each disturbed 1/2 acre would be reclaimed as operations progressed and estimated a 2-year minimum time period to remove 6,000 yards of material, the total disturbance in any 12-month period never exceeded the allowed 1-acre, 5,000-cubic yard DOGAMI limit. He contends that the trailer on the claim has always been self-contained, so that no proof of proper sanitation facilities is necessary. He also asserts that the mining operation uses no water from Lees Creek, and that he has discussed and resolved the water-related issues with the Douglas County Water Master. Daugherty further submits that BLM has denied him due process by insisting that state permits be obtained, thus circumventing his rights at the State level to challenge the necessity for those permits.

Daugherty objects to the State Director's recitation of additional incidents of alleged noncompliance, noting that the NNC addressed only the

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3/ The BLM has already served a NNC on Julie Daugherty on July 1, 1994. See Answer at 2 n.1, 5. On July 14, 1994, Julie Daugherty advised BLM that the claims now belong to Double Eagle Mining Association, of which she is president. See Answer at 6 n.3. We note that BLM has the authority to issue an NNC to all the parties involved in the mining operation. See Charles S. Stoll, 137 IBLA 116, 129 n.6, 130 (1996); B.K. Lowndes, 113 IBLA 321, 323 (1990).

failure to have State permits. Nevertheless, he denies that he has been in a continual state of noncompliance since January 1992, arguing that the record demonstrates that he was not out of compliance prior to January 10, 1994. Responding specifically to each incident of noncompliance raised in the State Director's decision, Daugherty states:

> 1) The claimant/appellant has sold the claims in question and is no longer operating them. The DOGAMI permit is not required by him, and the closure notice from them was improper in that it was served to the wrong person.
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> 2) The DEQ issue has been addressed previously.
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> 3) The water rights issue has been addressed previously. The claimant/appellant cannot stress enough that water is not used from Lees Creek.
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> 4) The accesses to the original bridge have been rocked numerous times, as BLM is fully aware of. They have been rerocked in accordance with both BLM and the sales agreement.
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> 5) The bridge has been rebuilt, in accordance with both BLM and the sales agreement.
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> 6) The second bridge was built, so that access could be made to the upper claim ([W]edge claim) and is included in the notice of the new owner/operator.
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> 7) The claimant/appellant no longer owns the claims in question. He understands that the new owner/operator has submitted a notice and is now working with BLM.
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> 8) The claimant/appellant no longer owns the claims. The question of removal of timber is being handled by the new owner/operator.
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> 9) All unmarked drums had been removed. The claimant/appellant disagrees with BLM's assessment of any water pollution, since he could find no evidence of such.
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> 10) Signs have been removed by the new owner/operator.
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> 11) Structures located on the claim are temporary in nature. The claimant/appellant has knowledge that the new owner/operator is working with the Douglas County Planning Commission concerning any required permits.

(SOR at 6.)

In its Answer, BLM argues that it correctly found that operations on the claims required a DEQ permit, citing Dale Daugherty's agreement in the

Stipulation with DEQ to apply for such a permit. Although Daugherty questions the State's authority to regulate activities on the mining claims, BLM asserts that Departmental regulations specifically require mining claim operators to comply with applicable State, as well as Federal, laws. Since Daugherty did not apply for a permit, BLM contends that he is in violation of 43 C.F.R. § 3809.2-2. The BLM also avers that, according to an August 9, 1994, DEQ letter, only three payments totalling $450 have been made on the fine, with the last one received in March 1994. The BLM maintains that Daugherty's 8-month arrearage clearly supports finding him in noncompliance with a State requirement.

The BLM contends that the mining operations on the claims required a DOGAMI permit authorizing the disturbance of over 1 acre and/or the removal of more than 5,000 cubic yards of material in a 1-year period. The BLM observes that the original December 29, 1991, Notice indicated that 6,000 yards of material would be removed between January 5 and November 12, 1992, from approximately 1.5 acres, and that an April 22, 1994, survey of the operation revealed that 2.4 acres had been disturbed. The BLM adds that, although DOGAMI advised Daugherty of its permit requirements in a March 28, 1994, letter, it was compelled to issue a closure order on May 19, 1994, terminating all mining activities pending procurement of a DOGAMI operating permit. The BLM states that subsequent compliance inspections have disclosed additional disturbance and minimal reclamation. Therefore, BLM maintains that Daugherty continues to violate State requirements for a DOGAMI permit and bond.

The BLM does not dispute Daugherty's contention that the trailer on the site contains adequate sanitation facilities and thus fulfills the NNC's demand that proof of such facilities be provided. It asserts, however, that the State Director considered the primary issue in this regard to be whether the presence of the trailer on the claim for more than 90 days violated Douglas County Planning Department ordinances. Since, as the County advised Dale Daugherty in an April 18, 1994, letter, the placement of the trailer on the site for more than 90 days subjected it to the same regulations as a mobile home, BLM concludes that Daugherty's failure to comply with the additional requirements violates 43 C.F.R. § 3809.2-2.

The BLM acknowledges that the record contains no eyewitness evidence as to the removal of water from Lees Creek. It insists, however, that reports of the creek going dry on the weekend of February 26-27, 1995, and observations of a pump and hoses on the bank of the creek suffice to establish that Daugherty has been removing water from the creek. The BLM, therefore, avers that he was required to obtain a water permit which he failed to do.

The BLM justifies the State Director's three bridge-related requirements as essential to prevent unnecessary and undue degradation. The BLM explains that mud on the site is tracked onto the original bridge and falls between the cracks into the stream, a condition which Daugherty has failed

to correct, and that a second bridge in such a short stretch of creek is not needed for the existing mining operation. The BLM defends the State Director's order to remove the no trespassing signs, arguing that the surface of a mining claim is open to recreationalists and others as long as they do not materially interfere with mining activity so such signs are inappropriate. Since Daugherty has failed to show error in the NNC, BLM concludes that the State Director's decision must be affirmed.

[1] In managing the public lands the Secretary of the Interior is mandated by section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA) to "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b) (1994); see Charles S. Stoll, 137 IBLA 116, 125 (1996), and cases cited therein. This requirement was expressly recognized in section 302(b) of FLPMA as applicable to the Department's administration of the Mining Law of 1872. The surface management regulations of 43 C.F.R. Subpart 3809 were promulgated pursuant to this authority. Arthur Farthing, 136 IBLA 70, 73 (1996); Fred Wilkinson, 135 IBLA 24, 25 (1996); Differential Energy, Inc., 99 IBLA 225, 229 (1987).

Under 43 C.F.R. § 3809.2-2, all operations on mining claims must not only be conducted to prevent unnecessary or undue degradation but also "shall comply with all pertinent Federal and State Laws." The regulations also expressly recognize the continuing applicability of "State laws and regulations relating to the conduct of operations or reclamation on Federal lands under the mining laws." 43 C.F.R. § 3809.3-1. Thus, the failure of an operator to obtain any necessary State permits serves as an adequate justification for issuance of an NNC. Bruce W. Crawford, 86 IBLA 350, 399-400, 92 Interior Dec. 208, 235 (1985). Such a notice properly issues where the authorized officer finds, as a fact, that specific permits are required and have not been obtained. Bruce W. Crawford, 86 IBLA at 400, 92 Interior Dec. at 236.

The burden of proof is on an appellant to show error in the decision appealed from, and, in the absence of such a showing, the decision will be affirmed. Charles S. Stoll, 137 IBLA at 126; Fred Wilkinson, supra; B.K. Lowndes, 113 IBLA 321, 325 (1990). Where, as in the present case, a party appeals from a BLM determination affirming an NNC, it is the appellant's obligation to show that the determination is incorrect. Id.

The BLM's NNC found Daugherty in noncompliance for failure to obtain necessary State permits. 4/ Specifically, BLM concluded that Daugherty

4/ We reject Daugherty's contention that BLM's insistence that State permits be obtained denies him his due process rights to challenge the necessity for those permits through state procedures. The BLM clearly delineated the permits needed and described the basis for its conclusion that they were required. See Bruce W. Crawford, 86 IBLA at 401, 92 Interior Dec. at 236. The DEQ and DOGAMI agreed that the specified permits were necessary. Appellant has not shown that he has successfully challenged the determination that permits are required.

needed a DEQ permit, a DOGAMI permit, and a water rights permit. 5/ These were the only problems identified in the NNC and, thus, were the only issues before the State Director on review of the NNC. Although the State Director cited Daugherty for additional noncompliances, her decision on those matters was premature given the absence of an NNC addressing those concerns. Accordingly, we set aside the State Director's decision to the extent it found Daugherty liable for noncompliances not noticed in the NNC. The BLM, of course, has the authority to issue future NNC's to the appropriate parties for any activities on the claims found to conflict with applicable laws and regulations.

The BLM grounds its affirmation of the necessity for a DEQ permit on the provisions of the Stipulation with DEQ. Daugherty does not deny that he was obligated under the Stipulation to apply for such a permit. He asserts instead that he sold the claims before he could apply. The Stipulation, however, directed Daugherty to file the permit application contemporaneously with signing the Stipulation. This he failed to do. Accordingly, the record amply supports BLM's finding that Daugherty failed to obtain the required DEQ permit. The record also sustains BLM's conclusion that Daugherty is in arrears in paying the fine set out in the Stipulation.

The BLM has sufficiently established that Daugherty was obligated to obtain a DOGAMI permit. The January 5 through November 12, 1992, operating period specified in the December 31, 1991, Notice flatly refutes Daugherty's contention that the Notice contemplated a 2-year period to remove 6,000 yards of material. Daugherty does not seriously dispute that the operations disturbed an area greater than 1 acre, but again relies on his sale of the claims as absolving him of any responsibility for acquiring a DOGAMI permit. Whatever his current involvement with the claims may be, the evidence, which includes correspondence from DOGAMI addressing the need for a permit, demonstrates that he should have secured a DOGAMI permit while he was the operator and owner of the claims. Accordingly, we affirm BLM's NNC to the extent it found Daugherty in noncompliance for failure to obtain a DOGAMI permit.

In response to BLM's statement that he needed to acquire a water rights permit, Daugherty insists that he has not used any water from Lees

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5/ The NNC also directed Daugherty to provide proof of proper sanitation facilities for the camp trailer according to county standards. Daugherty states that the trailer has always been a self-contained unit, and BLM does not dispute this statement. Thus, Daugherty has furnished the requested information and corrected the noncompliance. The State Director's decision, however, found that the presence of the trailer on the site for over 90 days required Daugherty to obtain a county occupancy permit, an issue beyond the scope of the NNC. Accordingly, as discussed infra, we set aside as premature the State Director's decision on this issue.

Creek, and that he "had contacted Douglas County Water Master Gary Ball on these complaints and they have been dismissed." (SOR at 5.) Daugherty provides no evidence in support of that assertion other than a copy of a report of a February 18, 1994, State inspection of the mining operation. (SOR, Ex. L-1.) That inspection, which took place on a Friday, was undertaken in response to a February 15, 1994, complaint that the "stream is being reduced to a trickle over the weekends to fill settling ponds." Id. Although the inspector found "no evidence of diversion from the creek," he noted the existence of "2 full settling ponds." Id. He also indicated that there was a possible violation of State law and stated, with regard to the action taken: "Left business card and a note informing operators of lack of water rights." Id. The report is certainly not evidence that the complaint was "dismissed."

Clearly, the water in the settling ponds came from somewhere. In its Answer, counsel for BLM states that "BLM reports that a pump and hoses have been observed on the bank of the creek." (Answer at 11.) Moreover, there is evidence in the record that the flow of Lees Creek below Daugherty's operation was substantially reduced later in February 1994, following the February 18, 1994, State inspection. See SOR, Ex. M. That resulted in another complaint being registered with the State on February 28, 1994. See SOR, Ex. L-2. There was no onsite inspection based on that complaint. A report, bearing the same date, stated that complainant was informed that an investigation was "already underway" and noted the "status" as "ongoing." Daugherty has not provided evidence that the investigation undertaken by the State was resolved in his favor. We find that Daugherty has failed to meet his burden of showing error in BLM's determination that he was required to seek a water permit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed in part and set aside in part.

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David L. Hughes
Administrative Judge

I concur:

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Bruce R. Harris
Deputy Chief Administrative Judge